

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

CLARENCE BERNARD ROSS,

Defendant-Appellee.

UNPUBLISHED

August 9, 2005

No. 253415

Wayne Circuit Court

LC No. 03-006826

Before: Whitbeck, C.J., and Sawyer and Fitzgerald, JJ.

PER CURIAM.

I. Overview

The prosecutor appeals as of right the concurrent sentences of five years' probation imposed on defendant Clarence Ross's four jury convictions of second-degree criminal sexual conduct.¹ The trial court departed from the statutory sentencing guidelines, which established a minimum term range of 43 to 107 months, because Ross was the principal caregiver for his paraplegic brother. We vacate Ross's sentences and remand for resentencing. We decide this appeal without oral argument pursuant to MCR 7.214(E).

II. Sentencing Challenge

A. Standard Of Review

We review the trial court's factual determination respecting the existence or nonexistence of a particular factor for clear error; we review de novo the determination that a particular factor is objective and verifiable; and we review the trial court's determination that the objective and verifiable factors constitute substantial and compelling reasons to depart from the statutory minimum sentence for an abuse of discretion.² An abuse of discretion occurs in this context when the trial court chooses an outcome falling outside the reasonable and principled range of possible outcomes.³

¹ MCL 750.502c(1)(a) (victim under thirteen years old).

² *People v Babcock (Babcock II)*, 469 Mich 247, 265; 666 NW2d 231 (2003).

³ *Id.* at 269.

B. Legal Standards

The trial court may depart from the sentencing guidelines only if it has a “substantial and compelling” reason to do so, and states that reason on the record.⁴ To constitute a substantial and compelling reason for departing from the guidelines, a reason must be objective and verifiable, must irresistibly attract the attention of the court, and must be of considerable worth in deciding the length of the sentence.⁵ The trial court must articulate the reason for the departure on the record, and this reason must justify the particular departure at issue.⁶

In determining whether a sufficient basis exists to depart from the sentencing guidelines, the trial court must ascertain whether the departure would result in a sentence more proportionate to the seriousness of the offense and the defendant’s criminal history than would adherence to the guidelines range.⁷ In addition, in departing from the guidelines range, the trial court must determine whether the particular departure is proportionate to the circumstances of the offense and the history of the offender.⁸

C. Articulation Requirement

The prosecutor argues that the trial court abused its discretion in departing downward from the guidelines range without considering the seriousness of the case or the nature of the departure. The trial court cited Ross’s role as his paraplegic brother’s principal caregiver as its sole reason for departing below the guidelines. This reason is objective and verifiable, and is not considered by the guidelines.⁹ Moreover, we have held that a defendant’s primary responsibility for an incapacitated relative can constitute a substantial and compelling reason for departing below the guidelines.¹⁰ Nevertheless, remand is necessary in this case because the trial court failed to articulate on the record why that reason justified the particular sentence imposed in this case, and how a sentence of probation would be more proportionate to Ross’s circumstances and those of the offenses than would a sentence within the guidelines.¹¹

Vacated and remanded. We do not retain jurisdiction.

/s/ William C. Whitbeck

/s/ David H. Sawyer

/s/ E. Thomas Fitzgerald

⁴ MCL 769.34(3); *Babcock II*, *supra* at 256.

⁵ See *Babcock II*, *supra* at 257-258.

⁶ *Id.* at 260; MCL 769.34(3).

⁷ *Id.* at 262-264; *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990).

⁸ *Babcock II*, *supra* at 264.

⁹ See MCL 769.34(3)(b).

¹⁰ See *People v Babcock (Babcock I)*, 250 Mich App 463, 471; 648 NW2d 221 (2002), *rev’d* on other grounds in *Babcock II*, on remand 258 Mich App 679; 672 NW2d 533 (2003).

¹¹ *Babcock II*, *supra* at 262-264; *Milbourn*, *supra*.